NO. 80-5589

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

PATRICK SIMPSON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

In cases arising in the criminal justice system, should lack of wealth be a suspect classification for purposes of equal protection analysis?

2.

May a trial judge,who has made a determination that probation is the appropriate punishment for one convicted of a crime, later revoke that probation for the nonpayment of the fine which was to have been paid in installments during the period of probation when during that period no payments are made, nor has the offender made any effort to comply with this term of his probation?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Patrick Simpson, was placed on probation under Georgia's Statewide Probation Act, Ga. Code Ann. § 27-2709, following his convictions under the state's obscenity statute, Ga. Code Ann. § 26-2101.

On March 24, 1977, after having been tried and found guilty on three counts of distributing obscene material, Simpson was sentenced to an aggregate of twenty-four months imprisonment and a fine of $10,000.00. The sentences were probated on condition that Simpson abide by the terms of his probation order. The convictions and sentences were affirmed in Simpson v. State, 144 Ga. App. 657, 242 S.E.2d 265 , appeal dismissed for want of a substantial federal question, 439 U.S. 887 (1978).

On June 14, 1978, Simpson again was convicted in State Court of Fulton County pursuant to his plea of guilty to an indictment containing three counts of distributing material. His aggregate sentence was twenty-four months and $10,000.00; the sentences were probated conditioned on payment of the $10,000.00 fine at the rate of $500.00 a month and other conditions set out in the probation order. Apparently no appeal was taken.

On the same day that he entered a plea of guilty to the second indictment, Simpson moved for reduction of fine on the first conviction. The motion was denied.

Thereafter, there was filed a petition to revoke probation on the first conviction and sentence as a result of his conviction on the second obscenity distribution charge, a violation of the conditions of probation. As a result of this action, the original sentence was probated on condition Petitioner abide by the terms of the order and that he pay $500.00 a month on the $10,000.00 fine.

Petitioner failed to abide by the conditions of his probated sentence and, after separate hearings on November 1, 1979, both sentences of probation were revoked and Petitioner required to serve his sentence in confinement. These actions were appealed and affirmed. Simpson v. State, ___Ga. App. ___, ___S.E.2d___ (Case Nos. 59871 and 59872, decided October 31, 1981).

Evidence adduced at the probation revocation hearings demonstrated that Petitioner had made less than a good faith effort to comply with the conditions of probation. First, while under a probated sentence requiring him not to violate the laws of Georgia, Petitioner was arrested on similar charges to those for which he was probated. He was, again, convicted. Second, from June 1978 until his probation was revoked in November 1979, Petitioner had paid a grand total of $290.00. Months passed with no effort whatsoever at making payment. (T. 13).

PART TWO

REASONS FOR NOT GRANTING THE WRIT

INTRODUCTION

This Court has granted certiorari in Wood, et al. v. Georgia, Case No. 79-6027. This Court's decision in Wood will be dispositive of the issues presented in the instant case. Two issues arise: the first, whether economic disadvantage should be a suspect classification for purposes of equal protection analysis in these circumstances, is implicit in the petition; the second is whether the financial resources available to a criminal defendant is a relevant factor in determining whether one is a good risk for a probation. The remaining portions of this brief will address those two issues.

I. ECONOMIC DISADVANTAGE HAS NOT BEEN ACCEPTED AS A SUSPECT CLASS FOR THE PURPOSES OF EQUAL PROTECTION ANALYSIS IN AREAS OF THE LAW ARISING OUTSIDE THE ADMINISTRATION OF CRIMINAL JUSTICE.

The Equal Protection Clause has always been thought to allow differences in treatment, even with some resulting inequality, as long as the state's purpose can be rationally justified. McGowan v. Maryland, 366 U.S. 420, 425 (1961). Absent invidious discrimination, a rationally based classification does not run afoul of the Equal Protection Clause. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 207 (1976); Dandridge v. Williams, 397 U.S. 471, 485 (1970); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

Petitioner implicitly argues that poverty is a suspect classification and, therefore, imprisonment for failure to pay a fine which is a condition of probation should be subjected to strict judicial scrutiny. This Court has viewed certain classifications as inherently suspect and subjected such suspect classifications to strict judicial scrutiny. See, e.g., McLaughlin v. Florida, 379 U.S. 184 (1964) [race]; Loving v. Virginia, 388 U.S. 1, 9 (1967)[nationality]; Graham v. Richardson, 403 U.S. 365 (1971) [alienage]. However, economic disadvantage in itself has not been identified as a suspect classification for purposes of equal protection analysis. Maher v. Roe, 432 U.S. 461, 471 (1977); San Antonio School District v. Rodriguez, 411 U.S. 1, 29 (1973); Dandridge v. Williams, 397 U.S. 471, 484-85 (1970).

While those who are economically disadvantaged may be confronted with an imposing wall of finances which keeps them from the life-style which they may aspire to, and while the fact that their financial resources are less than those of the more affluent individuals in society, therefore causing them to undergo greater economic hardship, this alone does not constitute a violation of the Equal Protection Clause. In fact, government regulations sometimes present a financial difficulty for the economically disadvantaged who seek to take advantage of a benefit or service which those who are financially independent can easily pay; yet, prepayment of certain fees can be exacted from all individuals regardless of their financial status. United States v. Kras, 409 U.S. 434 (1973) [prepayment of fees for those who seek to file petitions in bankruptcy]; Ortwein v. Schwab, 410 U.S. 656 (1973) [filing costs in civil appeals]. This Court has found that states need not fund abortions for indigent women simply because childbirth is funded, Maher v. Roe, supra, nor must a state in its educational system require precisely equal expenditures per pupil between the affluent and less affluent school districts, San Antonio School District v. Rodriguez, supra, nor must it provide additional money because a welfare recipient has more children than the maximum number for which welfare payments can be made, Dandridge v. Williams, supra. That there is an adverse effect on those of slight financial means does not render poverty a suspect classification for the purposes of equal protection. See, e.g., Arlington Heights v. Metro Housing, 429 U.S. 252 (1977).

This Court has not been insensitive to those who are economically disadvantaged; however, in none of the cases in which the equal protection clause has been applied has the Court labeled indigency

a suspect class. What the Court has done is examine state statutes and practices which place the indigent at a disadvantage in the criminal justice process, invalidating those procedures supported by no rational basis.

In Berman v. United States, 302 U.S. 211 (1937), poverty in the context of probation was not found to require stricter judicial scrutiny:

> . . . Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered. Probation or suspension of sentence "comes as an act of grace to one convicted of a crime." [citation omitted]. The considerations it involves are entirely apart from any re-examination of the merits of the litigation. Probation was designed "to aid the rehabilitation of a penitent offender"; "to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable." Thus probation cannot be demanded as a right. "The defendant stands convicted; he faces punishment, and cannot insist on terms or strike a bargain." [citation omitted].

Id. at 213. Consequently, while Griffin v. Illinois, 351 U.S. 12 (1956), requires a higher degree of scrutiny in matters relating

to a defendant's effective access to review a finding of guilt, the review of a matter of probation, payment of a fine, and ultimate confinement because of a failure to meet a condition of probation does not involve any fundamental interest requiring stricter judicial scrutiny.

To date the Court has made it clear that economic disadvantage is not accepted as a suspect class for purposes of equal protection analysis in areas of the law arising outside the administration of criminal justice; as such, economic status in itself is insufficient to trigger strict judicial scrutiny in criminal cases.

II. THE FINANCIAL RESOURCES AVAILABLE TO A DEFENDANT IS ONE RELEVANT FACTOR IN DETERMINING WHETHER HE IS A GOOD RISK FOR PROBATION. PERMITTING A TRIAL JUDGE TO WEIGH THIS FACTOR IN DETERMINING WHETHER PROBATION IS APPROPRIATE, AND ON WHAT CONDITIONS, FURTHERS THE BROAD SENTENCING DISCRETION NECESSARY FOR AN EFFECTIVE CRIMINAL JUSTICE SYSTEM AND CONTRIBUTES TO THE EFFICACY OF A PROBATION SYSTEM WHICH, TO BE EFFECTIVE, MUST HAVE A BROAD BASE OF PUBLIC SUPPORT.

The present case, as Wood, does not involve imprisonment for the immediate failure to pay a fine, Tate v. Short, 401 U.S. 395 (1971), or imprisonment beyond the statutory maximum as a penalty for the failure to pay a fine. Williams v. Illinois, 399 U.S. 235 (1970). Petitioner is not being held beyond the statutory maximum penalty; rather, his basic claim must be that he has a right to probation. Having been duly convicted, in one instance by a jury and in the second instance by plea, and having completed appellate review, any liberty interest which Petitioner may have had has been extinguished. Meachum v. Fano, 427 U.S. 215 (1976).

At issue here is an examination of the sentencing function of a trial judge. The importance of the sentencing function cannot be over emphasized, since this is the area by which the public assesses the success or failure of the criminal justice system. Whether the sentence is too short, too long, or otherwise inappropriate for the offense, may later lead the criminal defendant

to repeat his criminal endeavors, beget new criminal offenses, or result in others committing crimes because they see that the penalty meted out in the past has not outweighed the gain they perceive as a result of criminal endeavors. If the public perceives an absence of sanctions for those who violate conditions of probation, it seems obvious the public will view probation as a useless sentencing alternative. Similarly, if courts are unable to enforce conditions of probation then probation may cease to exist as a useful rehabilitative alternative.

Sentencing should be appropriate to the individual and the crime. Williams v. New York, 337 U.S. 241 (1949). In deciding the appropriate sentence for one convicted of a crime, there are many factors which the trial judge must weigh. By virtue of his office and the necessary exercise of discretion in performing his functions, a trial judge may often face dilemmas in weighing those factors. Family history, educational achievement, employment opportunities, community ties, the nature of the crime, and the record of the offender are all matters which the trial judge takes into consideration.

In considering probation, the trial judge must reach some conclusion on whether a defendant is a good risk. In assessing risks, prior criminal history should be examined to indicate whether the offender has in the past given any indication that probation would not be successful. The judge may also consider family and family support. In every case the judge must ask the question whether the offender can succeed on probation. Ultimately, only the defendant can insure a successful probation; the responsibility is his.

When a defendant and those persons who are interested in his welfare directly participate in insuring the success of probation in an effort to avoid imprisonment, that responsibility increases. The employment potential of the probationer provides the sentencing judge with some assurance that the offender has an added stake in the success of probation. A fine sometimes accomplishes the same purpose.

Regardless of whether the fine is paid in advance or in installments, it provides an assurance to the sentencing judge that the potential probationer will have a greater responsibility in conforming his conduct to the law. Naturally, the fear of revocation and possible imprisonment has an immediate impact on the probationer and may serve as a curb to overcome any temptation to violate the terms and conditions of probation. The payment of a fine provides a probationer with a heightened interest in the success of his probation.

The court may also legitimately consider the offender's ability to pay the fine; the court may consider offers of payment from family members or from the offender's employer. There is some indication in the testimony at the revocation hearings that Petitioner expected such assistance in this case. (T. 27). Certainly the interests of a probationer's employer in the probationer's welfare,evidenced by a willingness to pay or assist in paying a fine, is a factor which a sentencing judge can and should consider. Payment of a fine by an employer is similar to payment of a fine by family members or friends. Such support is clearly an important consideration in assessing the probability of a given probationer's success.

When the assurances that prompt a trial judge to impose a conditional probated sentence do not materialize, the factors

which determine the probation-worthiness of the offender are no longer present. Consequently, the basis of the judge's decision to grant probation has been materially altered and must be reassessed. When the assuring factors which were present when the judge imposed probation fail to materialize the defendant thus becomes a poor risk for probation. When the conditions surrounding the reassuring factors to insure success on probation cannot be satisfied, the probation does not become effective and the sentence must be served.

Generally, the availability of financial resources to a criminal defendant is not a controlling factor in terms of whether the individual is a good risk for probation. It is the nature of the crime and the record of the offender that is crucial. However, in cases such as this, the availability of financial resources is certainly an important factor; it is a rational factor.

The sentencing discretion provided to trial judges should not be limited. The availability of financial resources to the offender plays an appropriate role in the exercise of that discretion. The presence or existence of economic resources will play a minor, if not nonexistent, role in many cases, but in some few cases it plays an important role. Restrictions of the sentencing discretion given to trial judges should not as a general rule be applauded. In this case restrictions on sentencing serve only to frustrate the state's interest in maintaining an effective criminal justice system.

The mere possibility that some judges will abuse the discretion with which they are entrusted should not be a sufficient basis to limit the discretion of all judges. In Georgia, to curb any

abuses which may occur during sentencing, the General Assembly has adopted a Sentence Review Panel to review all sentences of five years or more for harshness. Ga. Code Ann. § 27-2511.1. Cf. Williams v. New York, 337 U.S. 241, 251-52 (1949). The consequences of limiting a judge's sentencing discretion are unthinkable. If a judge cannot impose a period of probation because he has no means of enforcing violations of probation then many defendants would find themselves confined without the opportunity to demonstrate their probation-worthiness by putting up a financial stake. Cf. Tate v. Short, 401 U.S. 395, 401 (1971)(Blackmun, J., concurring).

The Supreme Court of Georgia in Hunter v. Dean, 240 Ga. 214, 239 S.E.2d 791 (1977), cert. dismissed as improvidently granted, 439 U.S. 281 (1978), recognized that assurance of third party help is rational factor for a trial judge to consider in determining probation. Id. at 218. See also Calhoun v. Couch, 232 Ga. 467, 207 S.E.2d 455 (1974).

The use of installment plans for the payment of a fine was recognized in Williams v. Illinois, 399 U.S. 235, 245, n. 21 (1970), which cited with approval statutes in California, Michigan and Pennsylvania. The California statute permitted the payment of a fine in installments with imprisonment in the event of default, but for no longer than the maximum term for which the defendant might have been sentenced. Id. at 247. The Court went on to say that a state cannot fail to enforce fines against indigents because to do so would amount to inverse discrimination. Id. at 244.

Public perception of the success or failure to the criminal justice system is a direct result of the exercising of the sentencing function vested in the trial judge. Permitting the

judge to have wide sentencing discretion in terms of conditional releases such as probation, restitution, and other postconviction sentencing alternatives must have a broad base of public support. Recognition that the public has a keen interest in and awareness of the effectiveness of the criminal justice system was evidenced in this Court's 1976 opinions concerning capital punishment. Cf. Gregg v. Georgia, 428 U.S. 153, 179-80 (1976)(plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 352-53 (1976) (White, J., dissenting). Sentencing alternatives which do not provide for confinement are particularly susceptible to public scrutiny, and when those alternatives are viewed as ineffective the public reacts in seeking a legislative termination to such programs.

As the rate of crime continues to spiral, many states have found themselves confronted with the decision of whether mandatory sentencing procedures should be envoked. In the last several years the movement towards mandatory sentencing has increased.

Maintaining public confidence in Georgia's Statewide Probation Act is one of utmost importance if Georgia is to achieve another legitimate objective, the rehabilitation and punishment of offenders outside the confines of a penal institution.

CONCLUSION

In summary, indigency or poverty is not a suspect classification for equal protection analysis.

It is evident that in some circumstances it is necessary for a sentencing judge to assess the financial resources available to an offender to ensure that he is a good probation risk. Such an examination furthers the undeniable rational and legitimate state interest in investing trial judges with a broad sentencing discretion. Consideration that payment will be made in whole or part by a third party strengthens the probability of an offender's chances for a successful probation.

In assuring trial judges a broad sentencing discretion another rational and legitimate state interest is promoted: maintaining public confidence in a conditional release system.

The relationship between any classifications drawn and the purpose for which they are drawn is clear and rational. Under traditional equal protection analysis such classifications are legitimate and acceptable and do not offend the Constitution. Consequently, the judgment of the Court of Appeals of Georgia should be affirmed.

Respectfully submitted,

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